IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3440 OF 2000
IN
SUIT NO.4905 OF 2000

Ratan K. Marrott & Ors. ....Plaintiffs
V/s.
Lubin Enterprises & Ors. ....Defendants

Mr.J.P. Sen with Mr.F. Dubhash and Ms.Neeta Solanki i/b Mr.Kiran Jain for the Plaintiffs.

Mr.Ajay Fernandis i/b Billawala & Co. for Defendant No.6.

Mr.D.H. Mehta i/b Shetty & Associates for Defendant Nos.8 to 10 and 12 and 13.

CORAM : S.J. VAZIFDAR, J.
DATED : 27TH SEPTEMBER, 2007.

P.C. :

1. The suit is filed by six Plaintiffs for a declaration that their respective agreements are valid, subsisting and binding and for specific performance thereof. Specific performance is sought inter-alia by an order directing Defendant Nos.1 to 6 to construct a building in accordance with the said agreements, that the Plaintiffs be put in possession of their respective flats and to convey and transfer the suit property in favour of the Co-operative Society to be formed. The Plaintiffs have claimed

damages in the alternative. The Plaintiffs have also claimed a charge on the suit property to secure repayment of Rs.58,22,000/- and for the enforcement thereof.

2. Defendant No.1 is a partnership firm of which Defendant Nos.2 to 5 are partners. Defendant Nos.7 to 13 are the owners of the property on which a building was to be constructed by Defendant No.1. Each of the Plaintiffs entered into the usual agreements for sale of the flats with Defendant No.1.

3. By an agreement dated 3.5.1994 entered into between Defendant Nos.7 to 13 and Defendant No.2, Defendant Nos.7 to 13 permitted Defendant No.2 to develop the suit property. In consideration thereof, Defendant No.2 was to pay Defendant Nos..7 to 13 a sum of Rs.21,00,000/- and allot and provide to them five flats of two bedrooms each admeasuring 1100 sq.ft. built up area on ownership basis free of cost in the building to be constructed on the suit property. A sum of Rs.4,00,000/- was paid to Defendant Nos.7 to 13 as earnest money and the balance was to be paid on completion of the development. Defendant Nos.7 to 13 made the usual declarations regarding the title to the said property and also agreed to make out a marketable

title in respect thereof. Clause 9 recorded that Defendant Nos.7 to 13 had put Defendant No.2 in possession of the property with a right to develop the same including by putting up a building thereon and to sub-divide the entire property. Clause 14 declared that Defendant Nos.7 to 13 had submitted the building plans to the Corporation.

. Clauses 18, 21, 22, 23, 26 and 31 are important and read as under :-

> "18. It is hereby agreed by and between the parties hereto that excepting the five flats earmarked for allotment to the Owners, the Developer shall be entitled to dispose of all the remaining flats/shops/premises/garages etc., in the proposed new building/s on such terms and conditions as the Developer shall deem fit and shall also be entitled to appropriate the sale proceeds thereof.
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> 21. On completion of the construction of the new building/s, the Developer shall make necessary arrangements to get a co-operative housing society of the purchasers of flats/shops/premises/garages in the new building, formed and registered under the Maharashtra Co-operative Societies Act, 1960. Thereafter the Owners shall convey the property described in the Second Schedule hereunder written to the Co-operative Housing Society of such persons with the Developer joining the said conveyance as a confirming party.
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> 22. The Owners shall on completion of the Development, execute a Deed of Conveyance of the portion of the said property agreed to be developed and on

> which the building has been built in the name of the Developer or his nominee/nominees including a Co-operative Housing Society of flat/shop/garage owners. The Owners shall make the necessary arrangements to obtain their respective certificates under Section 230-A of the Income Tax Act, 1961 at the time of the conveyance of the said property.
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> 23. In the event of the Owners committing breach of this Agreement, the Developer shall be entitled to specific performance of this Agreement.
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> 26. The Owners shall, on the execution of this Agreement, put the Developer in possession of the property agreed to be developed under this Agreement.
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> 31. The Owners shall at the time of completion of Development, deliver to the Developer or his nominee/s all muniments of title in the Owner's possession which exclusively relate to the said property. (emphasis supplied.)

4. It is apparent from the aforesaid clauses that Defendant Nos.7 to 13 gave effective rights and control to Defendant No.2 in respect of the said property. The same was not limited to merely developing the same but also permitted Defendant No.2 to hold out to third parties that he had authority from and on behalf of Defendant Nos.7 to 13 to create the rights therein. In view thereof, the third parties naturally acted upon the representations made by Defendant No.2.

5(A). Pursuant to and relying upon the said agreements, several persons including each of the Plaintiffs in fact entered into the said agreements with Defendant No.1. However, this suit is filed only by six of such purchasers. Each of their agreements are identical except as to the area and price. The agreements are at Exhibits "C-1" to "C-6" to the plaint and are dated 21.12.1995, 17.1.1996, 10.1.1996, 20.12.1995, 27.12.1995 and 31.1.1996 respectively. There is no dispute that the agreements have been executed. They are the usual flat purchasers agreements. Nor is there any dispute that in fact pursuant to the said agreements the Plaintiffs have paid an aggregate sum of Rs.58,22,000/-.

(B). Whether the agreements between Defendant Nos.7 to 13 and Defendant No.2 was in fact for and on behalf of Defendant No.1 or whether it was only on behalf of Defendant No.2 makes little difference as far as the Plaintiffs rights are concerned as admittedly, Defendant No.2 also signed the said agreements entered into between the Plaintiffs and Defendant No.1.

6. It is pertinent to note that there are no

allegations whatsoever of mala-fides against the Plaintiffs. Nor is there any grievance that the Plaintiffs had not performed their obligations under their respective agreements in any manner whatsoever.

7. It is however contended on behalf of Defendant Nos.7 to 13 that the agreement between them and Defendant No.2 dated 3.5.1994 was terminated on 3.8.1999. (This was after the Plaintiffs agreement and after the Plaintiffs had paid the aforesaid amounts.) It was contended that there was no privity of contract between Defendant Nos.7 to 13 and the Plaintiffs and that therefore, specific performance of the agreement can never be granted.

8. I am unable to agree. The least that must be said in favour of the Plaintiffs is that at the interim stage, it is not possible to virtually non-suit the Plaintiffs on this ground. Firstly, it cannot by any stretch of imagination be contended that there is absolutely no privity between the Plaintiffs and Defendant Nos.7 to 13. As stated above, by the agreement dated 3.5.1994, Defendant Nos.7 to 13 expressly permitted Defendant No.2 to enter into the said agreements with plot purchasers. By the said agreement, Defendant Nos.7 to 13 further agreed to

form a society and to convey the property to the said society. Defendant Nos.7 to 13 also agreed and undertook to make out a marketable title and to furnish all the documents of title for the purpose of perfecting the rights of the society and thereby rights of each of the members of the society to be formed. In these circumstances, it cannot be said that there is no privity of contract.

9. To accept the above defence would lead to a chaotic situation opening the doors to fraud being committed against bona-fide purchasers in such circumstances. For instance, money could be collected from the flat purchasers in such circumstances and their rights could be defeated by the simple devise of the owners terminating the agreement with the developer. I do not consider it impossible in law that in such circumstances, the purchases would not be entitled to a decree for specific performance against the developer and the owners or in any event against the developer and by obtaining a further order calling upon the owners to also specifically perform their agreements either on the principal of agency or on the basis of their having permitting the developer to hold himself out as acting on behalf of them.

10. To reiterate, the least that must be said in favour of the Plaintiffs at the interlocutory stage is that it cannot be stated with any degree of certainty that the reliefs claimed by the Plaintiffs cannot be granted thereby non-suiting the Plaintiffs at the interim stage.

11. Mr.Mehta, the learned counsel appearing on behalf of Defendant Nos.8 to 10, and 12 and 13 then contended that at one stage the Plaintiffs and original Defendant No.6 had agreed to settle their claims on the basis of monetary compensation. Apparently after the alleged termination Defendant No.6 considered replacing Defendant Nos.1 to 5 as the developer. This contention was raised in view of an M.O.U. dated 1.10.1999 executed between the Plaintiffs and original Defendant No.6. The M.O.U. was executed on 1.10.1999. There is no dispute that the M.O.U. never came into effect. One of the principal conditions was that original Defendant No.6 would obtain the consent/N.O.C. from Defendant No.2. Admittedly, neither the N.O.C. nor the confirmation was obtained. Thus no agreement in fact fructified. Soon thereafter the Plaintiffs filed the present suit.

12. To refuse interim reliefs and to restrict the

Plaintiffs' claim to monetary compensation, would be grossly unfair in the facts and circumstances of this case. The Plaintiffs had entered into these suit agreements over ten years ago. They paid an aggregate sum of Rs.58,22,000/- over ten years ago towards part payment. They have suffered enormously as a result of the disputes between the Defendants inter-se. They were not responsible for the same or for an other breaches.

In these circumstances, I am of the view that the Plaintiffs are entitled to maintain their action for specific performance. Indeed to deny this would be grossly unfair in any view of the matter.

13. Mr.Mehta then contended that the injunction should only be restricted to land. In other words according to him the injunction ought not to prevent the Defendants from exploiting any benefits in respect thereof including availing of FSI in relation thereto.

14. With great respect to Mr.Mehta, I see no force in this argument. The flat purchasers did not agree to purchase only the land. They agreed to purchase the flats to be constructed on the land. By no process of reasonings could the Plaintiffs rights

be protected merely by granting an injunction with respect to a part of the suit land over which development cannot take place.

15. Lastly, Mr.Mehta contended that even if an injunction is to be granted, the Plaintiffs ought to be directed to furnish an undertaking under Rule 148 of the High Court (Original Side) Rules.

16. In the facts and circumstances of this case, I am not inclined to direct the Plaintiffs to do so. This is a fit case where the Plaintiffs should be relieved of the necessity of filing such an undertaking. The Defendants are answerable to the third parties including the Plaintiffs. The Plaintiffs have already paid a large amount of Rs.58,22,000/- over ten years ago. They have not derived any benefit whatsoever. The defences are purely technical in nature. Thus if for some reason, the suit is dismissed in respect of the claim for specific performance or even in its entirety, it would be only on such technical grounds.

17. On the other hand, in view of the alleged breaches of the agreement by Defendant Nos.1 to 5, the Plaintiffs have not only not suffered any damages but

have in fact benefited enormously thereby. Under the agreement with Defendant No.2, all that they were entitled to was a sum of Rs.21,00,000/- and five flats each admeasuring 1100 sq.ft. That agreement having been terminated, Defendant Nos.7 to 13 today are the owners of a property which has appreciated enormously over the last eight years - Defendant Nos.7 to 13 allegedly terminated the agreement on 3.8.1999. Defendant Nos.7 to 13 have forfeited Rs.4,00,000/- paid as earnest money. Even on a conservative estimate the value of the property today is admittedly atleast Rs.10.00 crores. Despite the same, Defendant Nos.7 to 13 refuse to provide the flats to the Plaintiffs which they are entitled to under the agreement with Defendant No.2 which, as stated above, Defendant Nos.7 to 13 expressly permitted Defendant No.2 to enter into including with the Plaintiffs.

18. In the circumstances, the Notice of Motion is made absolute in terms of prayer (c). The injunction shall operate in respect of the area of 949.00 sq.mtrs. It is further ordered and clarified that :-

i). The Defendants shall ensure that the full extent of the development rights in respect of 949 sq.mtrs. including FSI as

permissible today or which was required under the original plans whichever is greater is available and shall not in any manner encumber, part with, dispose of or otherwise howsoever affect the same.

ii). Defendant Nos.7 to 13 shall be entitled to apply for permission to develop any part of the remaining part of the property only after the demarcation of said area of 949 sq.mtrs. Further in any such application for development, a copy of this order shall be mentioned and annexed/forwarded.

iii). The Defendants shall not be entitled to develop the larger plot or any part thereof without the said area of 949.00 sq.mtrs. being first demarcated by the Bombay Municipal Corporation as per the original plan.

iv). While sanctioning the plans for development of any other properties or any other part of the larger plot on which the said property is situate, the Bombay Municipal Corporation shall ensure that

F.S.I. equivalent to that provided under the original building plans or as may today be available, whichever is grater, is always made available and shall be made available on the said plot.

v). The Bombay Municipal Corporation shall consider any application for the development of the remaining part of the property only after the aforesaid demarcation, and reservation/preservation of FSI and after notice to the Plaintiffs in writing.